FILED
SEP 23 1961
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 442

WILLIAM CHAE-SIK LEE and GRACE KOOM-SOON LEE,

Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACK WASSERMAN,
DAVID CARLINER,
Warner Building,
Washington, D. C.,
Attorneys for Petitioners.

WASSERMAN & CARLINER,
Of Counsel.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement	7
Reasons for Granting the Writ	10
Conclusion	20

CITATIONS

Cases:

American Trucking Associations, Inc. v. *United States*, 364 U.S. 1, 13-14 (1959)	11, 12, 15
Brewster v. *Gage*, 280 U.S. 327, 337 (1929)	17
Castle v. *McLaughlin*, 106 App. D.C. 145, 270 F. 2d 448, 451 (1959)	19
Claridge Apts. Co. v. *Commissioner of Internal Revenue*, 323 U.S. 141, 164 (1944)	17
Cox v. *United States*, 260 U.S. 427, 434 (1922)	17
Denver, R. G. W. N. R. Co. v. *Union P. R. Co.*, 351 U.S. 321, 341 (dissenting opinion) (1955)	11, 14
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1939)	16
Federal Communications Commission v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1952)	11, 12
Federal Power Commission v. *Idaho Paper Co.*, 344 U.S. 19 (1952)	11
Federal Trade Commission v. *Morton Salt Co.*, 334 U.S. 37 (1947)	11
Hansson Inc. v. *United States*, 178 F. Supp 922 (1959)	19
Hotch v. *United States*, 212 F. 2d 280 (9th Cir.) (1954)	19
Kimm v. *Rosenberg*, 363 U.S. 405, dissenting opinion at 412 (1959)	12
Mahler v. *Eby*, 264 U.S. 32, 44 (1923)	19

Cases—Continued

	Page
McLeod v. *Peterson*, 283 F. 2d 180 (C.A. 3, 1960)	20
Moser v. *United States*, 341 U.S. 41, 47 (1950)	20
National Labor Relations Board v. *Hearst Publications*, 322 U.S. 111, 131 (1943)	15
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, 315 (1932)	15
Parker v. *Motor Boat Sales*, 314 U.S. 244 (1941)	15
Perkins v. *Elg*, 307 U.S. 325 (1939)	10
Podea v. *Acheson*, 179 F. 2d 306 (C.A. 2, 1950)	20
Power Reactor Development Co. v. *IUE*, 367 U.S. 396 (1960)	15
Reynolds v. *McArthur*, 2 Pet. 417 (1829)	17
Rochester Telephone Corp. v. *United States*, 307 U.S. 125 (1938)	15
Securities and Exchange Commission v. *Chenery Corp.*, 318 U.S. 80, 87, 88 (1942)	10, 11
Securities and Exchange Commission v. *Chenery*, 332 U.S. 194 (1946)	11
Shaughnessy v. *Pedriero*, 349 U.S. 48	13
Sibbach v. *Wilson & Co.*, 312 U.S. 1, 14 (1940)	18
South Chicago Coal & Dock Co. v. *Bassett*, 309 U.S. 251 (1939)	15
Texas Gas Transmission Corp. v. *Shell Oil Co.*, 363 U.S. 263, 268 (1959)	11, 12
United States v. *Magnolia Petroleum Co.*, 276 U.S. 160, 163 (1927)	17
Vitarelli v. *Seaton*, 102 U.S. App. D.C. 316, 253 F. 2d 338, 342, reversed 359 U.S. 535, 539, and separate opinion 546, 547 (1959)	11, 13

Statutes and Regulations:

Act of December 29, 1950, as amended, 64 Stat. 1129, 68 Stat. 961, 5 U.S.C. 1031, et seq.	13
Administrative Procedure Act, 5 USC 1003	4, 5, 7, 9, 18

Code of Federal Regulations:

8 CFR 214.4	fn 14
8 CFR 245	19
8 CFR 245.1	5, 6, 8, 11, 16, 18

Statutes and Regulations—Continued

	Page
8 CFR 248	fn 14
8 CFR 42.42(c) [21 F.R. 6270 (1956)]	17
17 F.R. 9989, 10037 (1952)	18
24 F.R. 1375, 2624 (1959)	6, 7, 11, 18, 19
Immigration and Nationality Act of 1952:	
8 U.S.C. 1153	17
8 U.S.C. 1184	fn 14
8 U.S.C. 1255	3, 4, 9, fn 14, 18
8 U.S.C. 1258	fn 14
Information and Educational Exchange Act of 1948:	
Sec. 201(b), 22 U.S.C. 1431, 62 Stat. 6)	17
Sec. 2, 22 U.S.C. 1446(b), 70 Stat. 241,	4, 8, 9, 10, 11, 12, 15, 16
Miscellaneous :	
H. Rep. 1086, 87th Cong., 1st Sess., p. 25	13
S. 2237, Section 5(a), 87th Cong., 1st Sess.	13
S. Rep. 1515, 81st Cong., 2nd Sess.	fn 14
S. Rep. 1608, 84th Cong., 2nd Sess., p. 4	16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No.

WILLIAM CHAE-SIK LEE and GRACE KOOM-SOON LEE,

Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment of the District Court.

Opinions Below

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix at pp. 21-25. The District Court filed no opinion. Its judgment is set forth at p. 27 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1961. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Where the Immigration and Naturalization Service has relied upon an invalid administrative regulation to refuse to accept, to act upon, and to grant an application for permanent residence by an alien exchange visitor who had been declared by the Service to be urgently needed in the United States, may the Court of Appeals uphold the administrative decision by substituting an alternative ground?

2. Whether the denial of petitioners' applications for adjustment of their status in the United States may be sustained upon the basis of a regulation which gives retrospective operation to the Information and Educational Exchange Act, as amended, in the face of an explicit statutory directive that its provisions shall operate prospectively only.

3. Whether the provisions of the Information and Educational Exchange Act, as amended, which require that it shall apply only to persons "acquiring exchange visitor status subsequent to June 4, 1956", govern an alien who was admitted to the United States in the status of nonimmigrant student in 1953 and changed his status to that of an exchange visitor in 1954, but extended his stay in the United States as an exchange visitor after June 4, 1956.

4. Whether the regulation upon which the Attorney General bases his denial of petitioners' applications for adjustment of status in the United States is valid under Section 4 of the Administrative Procedure Act, when no notice of the

proposed rule making has been published in the Federal Register and when the proposed regulation deprives a class of nonimmigrant aliens of benefits to which there previously was no regulatory or statutory bar.

5. Whether the Attorney General may deny an application for adjustment of status in the United States by reason of petitioner's status as an exchange visitor where it appears that petitioner entered the United States as a nonimmigrant student, that after entry he sought permission to work as a medical intern, that he was advised by immigration officials that in order to work as a medical intern, he must establish that his employing hospital is a participant under the Exchange Visitor Program, and that such advice was incomplete in that three alternative methods were available by means of which the petitioner could have lawfully accepted employment as a medical intern, without acquiring exchange visitor status.

Statutes and Regulations Involved

Section 245 (a) of the Immigration and Nationality Act, as amended (8 U.S.C. 1255) provides:

> "The status of an alien who was admitted to the United States as a bona fide nonimmigrant may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, (3) an immigrant visa was immediately available to him at the time of his application, and (4) an immigrant visa is immediately available to him at the time his application is approved.

A quota immigrant visa shall be considered immediately available for the purposes of this subsection only if the portion of the quota to which the alien is chargeable is undersubscribed by applicants registered on a consular waiting list."

Section 201 of the Information and Educational Exchange Act, as amended, 22 U.S.C. 1446(b)(1958 ed.), provides:

"No person admitted as an exchange visitor under this section or acquiring exchange visitor status after admission shall be eligible to apply for an immigrant visa, or for a nonimmigrant visa under section 1101(a)(15)(H) of Title 8, or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States: Provided, That upon request of an interested Government agency and the recommendation of the Secretary of State, the Attorney General may waive such two-year period of residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest: And provided further, That the provisions of this subsection shall apply only to those persons acquiring exchange visitor status subsequent to June 4, 1956."

Section 4(a), (b) and (c) of the Administrative Procedure Act [5 U.S.C. 1003(a), (b) and (c)] provides:

"General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a state-

ment of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor, in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose.

"The required publication or service of any substantive rule (other than granting or recognizing exemption or relieving restricting or interpretative rules and statements of policy shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule."

8 Code of Federal Regulations, Part 245.1 (1959 Supp.) provides:

"Part 245—Adjustment of Status of Nonimmigrant to That of a Person Admitted for Permanent Residence

"§245.1 Application. An alien whose deportability has not been established in proceedings under Part 242 of this chapter subsequent to August 21, 1958, may if he believes he meets the eligibility requirement of section 245 of the act, file an application Form I-507 with the district director in whose district he resides. A visa shall not be held to be available for a person claiming a preference quota or a nonquota status under section 101(a)(27)(A) or (F) unless a petition to accord such status has been approved in accordance with section 204 or 205 of the act. * * *"

F. R. Doc. 59-1599 (24 F. R. 1375) (1959) provides:

"Part 245—Adjustment of Status of Nonimmigrant to That of a Person Admitted for Permanent Residence

"The following amendment to Chapter I of Title 8 of the Code of Federal Regulations is hereby prescribed:

"Section 245.1 Application is amended by adding the following sentence immediately preceding the last sentence thereof to read as follows: 'No alien who has had the status of an exchange alien in the United States may apply for adjustment of status unless pursuant to section 201(b) of the United States Information and Educational Exchange Act of 1948, as amended, he has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States or the Secretary of State has recommended that the two-year period be waived."

"This order shall become effective 30 days following publication in the Federal Register. Compliance with

the provisions of section 4 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1003) as to notice of proposed rule making is unnecessary in this instance because the rule prescribed by the order relates to agency procedure."

Statement

Petitioner, William Chae-Sik Lee, is a Korean national who was lawfully admitted to the United States as a nonimmigrant student on November 15, 1953 (R. 9). He was first admitted to pursue the study of theology at the Dallas Theological Seminary but subsequently sought permission to work in the United States as a medical intern (R. 9, 11). He was advised by the Immigration and Naturalization Service that in order for him to accept employment as an intern, he must apply for a "Change of Status" (R. 11). Petitioner filed such an application, but was thereafter informed that his application did not have "sufficient supporting evidence" in the absence of a letter from the employing hospital stating whether it was a participant under the Exchange Visitor Program (R. 12). Upon submitting such information, *inter alia*, petitioner was permitted to be employed as an intern and his status was adjusted to that of exchange visitor on June 18, 1954 (R. 8).

His stay in the United States as an exchange visitor has been extended at various times since, namely, in 1955, 1956, 1957, and 1958. It expired finally on December 30, 1958. (Administrative Record, R. 16.)

Petitioner, Grace Koom-Soon Lee, is also a Korean national who was lawfully admitted to the United States as a nonimmigrant student on November 28, 1954 (R. 3, 6). She and the petitioner, William Chae-Sik Lee, were married in California on December 30, 1955 (R. 3, 6). Following the birth of a child, Mrs. Lee sought and was granted a

change of status to that of a visitor and her status, for purposes of the proceedings below, turns upon that of her husband (R. 15).

On August 5, 1959, the Order of the Sisters of St. Benedictine, operating the Hibbing General Hospital at Hibbing, Minnesota, filed a petition with Immigration and Naturalization Service to grant preferred immigrant status to the petitioner, William Chae-Sik Lee. In support of its petition, the hospital submitted an affidavit in which it stated that the Hibbing General Hospital serves a community of 20,000 people, that it had been in search of a medical anaesthesiologist for five years, that the petitioner was the first qualified person whose services it had been able to obtain, and that he would be the only anaesthesiologist in the entire Congressional District (R. 2, 3).

The Service thereafter, on August 28, 1959, determined that the petitioner is a person "whose services are needed urgently in the United States because of (his) high education, technical training, specialized experience or exceptional ability" by approving the petition filed by the Order of the Sisters of St. Benedictine (R. 3).

On September 22, 1959, petitioners filed applications with the Immigration and Naturalization Service for an adjustment of their status to that of permanent residents so that Dr. Lee could accept permanent employment as anaesthesiologist with the Hibbing General Hospital (R. 3, 4). The Service refused to act upon the application and on September 30, 1959, gave the following ground as the basis for its action:

> "Under the provisions of Sec. 245.1, Title 8, Code of Federal Regulations, we are prohibited from accepting the application of Dr. William Chae-Sik Lee. This section provides that no alien who has had the status

> of an exchange alien in the United States may apply for adjustment of status unless pursuant to Sec. 201(b) of the United States Information and Educational Exchange Act of 1948, as amended, he has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States or the Secretary of State has recommended that the two year period be waived.
>
> "* * * Dr. Lee had the status of an exchange alien and has not had the required two years residence abroad, or a waiver thereof." (R. 3, 4.)

The action below was instituted on October 6, 1959, to obtain a judgment declaring that the refusal of Immigration and Naturalization Service to act upon and to grant petitioners an adjustment of their status to that of permanent residents is contrary to law (R. 2-5). Upon cross motions for summary judgment, the District Court entered summary judgment for the Attorney General (R. 12, 13).

On appeal to the District of Columbia Circuit, the petitioners urged that:

1. The Information and Educational Exchange Act of 1948, as amended on June 4, 1956 [22 U.S.C. 1446(b) (1958 ed.)] (70 Stat. 241) does not apply to an alien who acquired status as an exchange visitor prior to the date of the amendment.

2. The administrative regulation upon which the Immigration and Naturalization Service relied to deny petitioner consideration of his application for an adjustment of his immigrant status was adopted in violation of Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003, Section 245 of the Immigration and Nationality Act, as

amended, 8 U.S.C. 1255, and of Section 201 of the Information and Educational Exchange Act, as amended, 22 U.S.C. 1446(b).

3. The Immigration authorities are barred from invoking the provisions of the Information and Educational Exchange Act, as amended, 22 U.S.C. 1446(b), (70 Stat. 241), against the petitioner by reason of the fact that his status as an exchange visitor, if it renders him ineligible to an adjustment of his status to that of a lawful permanent resident, resulted from an erroneous advice of the immigration officers.

The Court of Appeals below affirmed by a split decision (R. 15-21). It held that the petitioner had "acquired, from year to year, temporary exchange visitor status" and since "some of these acquisitions occurred after June 4, 1956" (the operative date of the relevant statute), the Act applied to the petitioner (Appendix, p. 22).

As to the administrative regulation, the Court below held, citing *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, 88, that error in the administrative determination is no basis for remand to the Immigration and Naturalization Service if the "*result is correct*". (Appendix, pp. 23-24).

The issue of mistake, which the petitioner urged, was decided adversely *sub silentio*.

Reasons for Granting the Writ

I

The issue whether a reviewing court may sub-titute its own grounds to uphold the action of an administrative agency has often been before this Court since the leading decisions in *Perkins* v. *Elg*, 307 U.S. 325 (1939); *Federal Communications Commission* v. *Pottsville Broadcasting*

Co., 309 U.S. 134 (1939); and *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 87, 88 (1942). Cf. *Securities and Exchange Commission* v. *Chenery*, 332 U.S. 194 (1946); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (19); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 19 (1952); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (1952); *Denver R.G.W.N.R. Co.* v. *Union P.R. Co.*, 351 U.S. 321, 341 (1955); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1959); *American Trucking Association Inc.* v. *United States*, 364 U.S. 1 (1959).

Petitioner's application for permanent residence was refused by the Immigration and Naturalization Service upon the express and sole ground that its regulation forbade accepting such applications from any alien

> "*who has had* the status of an exchange alien in the United States * * *." 24 F.R. 1375, 8 Code of Federal Regulations 245.1 (1959 Supp.) (Emphasis supplied.)

in contradistinction to the statute which provides that the relevant prohibition

> "shall apply only to those persons acquiring exchange status subsequent to June 4, 1956." 70 Stat. 241,

[1] Petitioner *acquired* exchange visitor status prior to the effective date of this provision, namely, on June 18, 1954 (R. 9). The terms of the regulation thus apply to him by reason of his status as an exchange alien prior to June 4, 1956, and is, therefore, in conflict with the statute. Contrary to the assumption of the Court of Appeals, which it thought "worth noting" although "not necessary to the validity of the action the Attorney General took", the regulation could not be taken to apply to the petitioner "as an alien who has had (exchange) visitor" status up to the time when he applies for adjustment of status. (Appendix p. 25). Petitioner's status as an exchange visitor had expired on December 30, 1958, prior to his application for status as a permanent resident on September 22, 1959 (Administrative record, R. 3). The refusal of the immigration authorities to accept petitioner's application, moreover, was

22 U.S.C. 1446(b) (1958 ed.).

The Court of Appeals below held this ground error. In reaching its decision to affirm the administrative action, it held that the "decision 'already made should properly be based upon another ground' * * *" (Appendix, p. 24).

The Court then undertook to make a determination which was within the technical competence of the Immigration and Naturalization Service to make and which that agency had not made, namely, that the petitioner "acquired from year to year, temporary exchange visitor status". Because "some of these *acquisitions* occurred after June 4, 1956", the Court held that Section 201(b) of the statute may be substituted to support the administrative order (Appendix, pp. 22, 24). (Emphasis supplied.) See Point II, *infra*.

The decision thus made by a divided District of Columbia Circuit poses the question whether it exceeded the appropriate scope of judicial review of the administrative determinations of the Immigration and Naturalization Service.

This Court has recognized the importance of this problem when it has involved other administrative agencies. Cf. *Texas Gas Transmission Corp* v. *Shell Oil Co.*, 363 U.S. 263, 368 (1959); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, 13-14 (1959); *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86, 91 (1952). See also *Kimm* v. *Rosenberg*, 363 U.S. 405, dissenting opinion at 412 (1959).

---

expressly stated on September 30, 1959, to be based on the fact that he "*had* the status of an exchange alien * * *" (R. 4). The regulation, therefore cannot be "understood to mean" that it barred the petitioner because he "has had (exchange visitor) status up to the time" he applied for permanent residence. The Attorney General thus did not rely upon the statute "ultimately and in substance" any more than he did "immediately and in form". See Appendix, p. 25.

This Court has also had prior occasion to review and to reverse the interpretation which the District of Columbia Circuit has placed upon the holding in the two *Chenery* decisions. Cf. *Vitarelli* v. *Seaton*, 102 U.S. App. D.C. 316, 253 F. 2d 338, 342, reversed, 359 U.S. 535, 539, and separate opinion, 546, 547 (1958). The decision below plainly adheres to an interpretation of the *Chenery* doctrine which this Court has previously corrected.

Apart from the importance which the scope of judicial review of administrative decisions has had previously, legislation which has just been approved by Congress makes the role of the Circuit Courts of especial concern at the present time.

S. 2237, enacted by the 87th Congress on September 15, 1961,[2] [Section 5(a)], vests jurisdiction to review deportation orders of the Immigration and Naturalization Service in the Circuit Courts of Appeal in the first instance in place of the District Court, pursuant to the procedures prescribed by the Act of December 29, 1950, as amended, 64 Stat. 1129; 68 Stat. 961, 5 U.S.C. 1031, et seq. Cf. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48.

Inasmuch as the Circuit Courts of Appeal will be assuming a larger role than formerly in the review of orders of the Immigration and Naturalization Service, it would seem appropriate to examine the bounds which govern the judicial review of its administrative decisions.

II

An important corollary to the first issue is whether the reviewing Court may interpose as a basis for its affirmance a determination which lies, initially, at least,

[2] Although the legislation has not yet been formally approved by the President, the judicial review provisions have been urged by the present Deputy Attorney General. See H. Rept. 1086, 87th Cong., 1st Sess., p. 25.

within the technical competence of the administrative agency and which that agency has not made.

The Court below, as petitioners have noted, ruled that the petitioner "acquired, from year to year, temporary exchange visitor status" (Appendix, p. 22).

Whether the petitioner "acquired" such status from year to year, or whether he "acquired" it when he obtained his exchange visitor status on June 18, 1954, and merely "*extended* his stay under the status already acquired, is, as is indicated by a reading of the relevant statute and the Questions Presented, the essential and ultimate issue to be decided.

What is important here is that the administrative agency "which Congress has established as the expert in this field" [*Denver R. G. W. N. R. Co.* v. *Union P. R. Co.*, 351 U.S. 321, 341 (dissenting opinion) (1955)] has not by decision, by statement of policy, or by regulation, made the determination essayed by the District of Columbia Circuit, namely, that the "acquisition of a status" and the "extensions of stays under that status" are equivalent.[3]

This, of course, is in conflict with the well-settled prin-

---

[3] This determination, as petitioners note later, if not clearly error, is at best so dubious that an initial judgment of the question should be made by the administrative agency. The relevant provisions of the immigration statute, the regulations, and long-standing administrative practice all indicate that the "acquisition of status" is obtained by one type of proceeding and that the "extensions of stays" in the United States are obtainable in another type of proceeding. Cf. 8 U.S.C. 1184, 1255, 1258; 8 C.F.R. 214.4, 245, 248. See also S. Rep. 1515, 81st Cong., 2nd Sess., 1950, pp. 529-530; 591-611. In the latter proceeding in order for petitioner to be eligible for the extensions of his permission to remain in the United States as an exchange alien in 1955, 1956, 1957, and 1958, he was required to show that he "*is (then) maintaining* the nonimmigrant status under which he is permitted to remain in the United States". 8 C. F. R. 214.4. (Emphasis supplied.) The question, therefore, is: Does an alien *acquire* a status by its extension when such an extension is conditioned upon a showing that the alien has not only *previously acquired* such status but is *maintaining* it?

ciple of looking initially to the competent administrative agency for its determination of issues within its special experience and expertise. See *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1932); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1938); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U.S. 251 (1939); *Parker* v. *Motor Boat Sales*, 314 U.S. 244 (1941); *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 131 (1943); *American Trucking Association* v. *United States*, 364 U.S. 1, 13-14 (1959); *Power Reactor Development Co.* v. *IUE*, 367 U.S. 396 (1960).

III

Should the Court of Appeals be believed to have acted within the scope of its reviewing function, a further issue is whether the District of Columbia Circuit properly construed the statute.

The statute, the Information and Exchange Act of 1948, as amended June 4, 1956, 22 U.S.C. 1446(b) (1958 ed.), 70 Stat. 241, provides that:

> "No person admitted as an exchange visitor * * * or acquiring exchange visitor status after admission, shall be eligible to apply for an immigrant visa * * * or for adjustment of status to that of an alien lawfully admitted for permanent residence, until it is established that such person has resided and been physically present in a cooperating country or countries for an aggregate of at least two years following departure from the United States * * *."

Two provisos were written into the 1956 amendment. The first, not relevant here, permits a waiver under certain conditions of the requirement of a two year residence abroad.

The second proviso explicitly and unambiguously states:

> " * * * the provisions of this paragraph *shall apply only to those persons acquiring exchange visitor status subsequent to the date of the enactment hereof.*" (Emphasis supplied.)

Two questions are posed by the construction of the statute adopted by the Court below, first, whether the Court properly interpreted its legislative history, and second, whether it applied the familiar principle of statutory construction which disfavors retroactivity except upon the clearest mandate.

(1) The Court of Appeals found support for its ruling that petitioner was barred from applying for permanent residence because of the extension of his stay in the United States as an exchange visitor after June 4, 1956, in a single sentence in the legislative report which accompanied the 1956 amendment. S. Rep. 1608, 84th Cong., 2nd Sess., p. 4. It states that the second proviso:

> "* * * is not intended to preclude the application of the 2-year-absence requirement to any exchange visitor who, subsequent to the enactment of the present bill, may apply for an extension of the period of time for which he was admitted."

This cautionary language, which merely *permits* the application of the terms of the amendment to exchange visitors who apply for extensions of stays after its effective date, was converted by the Court below into an "intended" and mandatory requirement (Appendix, p. 22).

It is significant, in view of the statement in the opinion of the Court of Appeals that the statute "has been understood and enforced * * * correctly" (Appendix, p. 22), that the Immigration and Naturalization Service adopted

no regulation to implement the 1956 amendment other than its 1959 amendment to 8 C.F.R. 245.1. This amendment, as we have noted earlier, broadly applies the provisions of the statute to any "alien who has had the status of an exchange alien in the United States", and manifestly does not reflect the intent of Congress.

By contrast, the State Department, which enforces the statute in connection with its function of issuing visas to intended immigrants, framed a regulation in 1956 to apply the 1956 amendment in express terms specifically to exchange visitors who obtained "extensions of the period of (their) temporary admission", 21 F. R. 6270 (1956), 22 C. F. R. 42.42(c) (1958 ed.). But the State Department did not view the sentence upon which the Court of Appeals relied as stating a mandatory formula. Instead of accepting the statutory date, June 4, 1956, referred to in the Senate Report, the State Department's regulation selected September 21, 1956, the effective date of the publication of its regulation.

(2) This Court has held that even where permissible, retroactivity is not favored except upon the clearest mandate. *Claridge Apts. Co.* v. *Commissioner of Internal Revenue*, 323 U.S. 141, 164 (1944). See also *Brewster* v. *Gage*, 280 U.S. 327, 337 (1929); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162 (1927); *Cox* v. *United States*, 260 U.S. 427, 434 (1922); *Reynolds* v. *McArthur*, 2 Pet. 417 (1829).

The statutory issue here is important for the guidance of the International Educational Exchange Program. While the undoubted legislative purpose of the Information and Educational Exchange Act of 1948, 62 Stat. 6, 22 U.S.C. 1431, is to promote an interchange of persons, knowledge and skill among the various cooperating countries, the provisions of 8 U.S.C. 1153(a)(1) equally indi-

cate a congressional intent to favor immigrants "whose services are needed urgently in the United States", and the provisions of 8 U.S.C. 1255, under which the petitioner applied, indicate that they should be able to become permanent residents without having to depart and reenter the United States.

A determination of the proper balance to be given to the conflicting congressional purposes, the interpretation and weight to be given to the legislative history of the 1956 amendment, and a determination of the effect of the rule that statutes are to be given, if possible, prospective operation—are issues which warrant consideration by this Court.

IV

A further question which the Court below did not reach in view of its disposition of the appeal is one which bears generally upon the conduct of administrative agencies.

The regulation upon which the Immigration and Naturalization Service relied to bar acceptance of the petitioner's application for permanent residence was adopted as an amendment to 8 C.F.R. 245.1 (1959 Supp.). It was published without compliance with Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003, the reason being given that it "is unnecessary * * * because the rule relates to agency procedure" 24 FR 1375 (1959)

The reason patently is error and in violation of *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1940), which sets forth the test of a rule of procedure to be whether it determines substantive rights or whether it regulates the process "for enforcing rights and duties recognized by substantive law"

The regulation here plainly determined the substantive right of an alien in the United States to apply for status as a permanent resident. It is not without significance that both when the original regulation was published on November 6, 1952, 17 F.R. 9989, 10037, and when other

similar amendments were adopted in the very year of the amendment of February 25, 1959, the Immigration and Naturalization Service complied with the notice requirements of the Administrative Procedure Act. See especially 24 F.R. 2624 (April 4, 1959) amending 8 C.F.R. 245.

Failure to comply with the notice requirements of the Administrative Procedure Act has been held to render the regulation invalid. *Hausson Inc. v. United States*, 178 F. Supp. 922 (1959) (U. S. Customs Court); *Hotch v. United States*, 212 F. 2d 280 (9th Cir.) (1954). See also *Castle v. McLaughlin*, 106 App. D.C. 145, 270 F. 2d 448, 451 (1959), in which an amendment to the District of Columbia zoning regulations was declared invalid for failure to give the prescribed public hearing prior to the adoption of the amendment. See too, *Mahler v. Eby*, 264 U.S. 32, 44 (1923): "It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise • • •."

In view of the impact which this issue has upon the operation of all administrative agencies, it is urged that the question is of sufficient importance to justify review by this Court.

V

A final question which deserves consideration by this Court is whether the petitioner should not be relieved of any bar which may be invoked against him because of his status as an exchange visitor.

The record establishes that the petitioner became an exchange visitor, after his entry to the United States as a nonimmigrant student to study theology, upon the mistaken advice of the Immigration and Naturalization Service, that this status was required in order for him to accept employment as a medical intern.

This Court has held in *Moser* v. *United States*, 341 U.S. 41, 47 (1959), that mistake is available to relieve an alien of his status as a neutral alien who had been relieved from military service. See also *Podea* v. *Acheson*, 179 F. 2d 306 (C.A. 2, 1950); and *McLeod* v. *Peterson*, 283 F. 2d 180 (C.A. 3, 1960).

The Court below apparently believed that it need not discuss the issue of mistake. Yet it is especially in immigration proceedings where aliens unfamiliar with both the English language as well as the manifold obligations and measures of relief provided in the statutes and regulations rely upon the advice given them by government officials.

Needless to say, Immigration Service officers, like other humans, may err. An examination of the applicability of the doctrine of mistake in the relations between immigration officers and aliens in the United States is important for the guidance both of the administrative agency and the people whom they undertake to advise.

Conclusion

For the reasons given above, it is urged that a writ of certiorari should be granted.

JACK WASSERMAN,
DAVID CARLINER,
Warner Building,
Washington, D. C.,
Attorneys for Petitioners.

WASSERMAN & CARLINER,
Of Counsel.